

LIBRARY
SUPREME COURT, U.S.
Nos. 428, 429, 611, 612

Office - Supreme Court, U. S.

FILED

MAR 5 1952

CHARLES ELMORE CLARK

In the Supreme Court of the United States

OCTOBER TERM, 1951

PENNSYLVANIA WATER & POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF
BALTIMORE, PETITIONER

v.

PENNSYLVANIA WATER AND POWER COMPANY AND PENNSYLVANIA
PUBLIC UTILITY COMMISSION

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, PETITIONER

v.

PENNSYLVANIA WATER AND POWER COMPANY AND PENNSYLVANIA
PUBLIC UTILITY COMMISSION

MOTION OF THE FEDERAL POWER COMMISSION TO
POSTPONE ARGUMENT IN NOS. 428 AND 429 FOR
THREE WEEKS AND MEMORANDUM AS AMICUS
CURIAE IN SUPPORT OF PETITIONS FOR CER-
TIORARI IN NOS. 611 AND 612

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 428

PENNSYLVANIA WATER & POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

No. 429

PENNSYLVANIA PUBLIC UTILITY COMMISSION, PETITIONER

v.

FEDERAL POWER COMMISSION

No. 611

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF
BALTIMORE, PETITIONER

v.

PENNSYLVANIA WATER AND POWER COMPANY AND PENNSYLVANIA
PUBLIC UTILITY COMMISSION

No. 612

PUBLIC SERVICE COMMISSION OF MARYLAND, PETITIONER

v.

PENNSYLVANIA WATER AND POWER COMPANY AND PENNSYLVANIA
PUBLIC UTILITY COMMISSION

MOTION OF THE FEDERAL POWER COMMISSION TO
POSTPONE ARGUMENT IN NOS. 428 AND 429 FOR
THREE WEEKS AND MEMORANDUM AS AMICUS
CURIAE IN SUPPORT OF PETITIONS FOR CER-
TIORARI IN NOS. 611 AND 612

The Federal Power Commission moves that this
Court postpone the argument in Nos. 428 and 429

three weeks from the week of March 31 to the week of April 21, so as to enable the Court to decide whether to grant certiorari in Nos. 611 and 612, and if certiorari is granted, to set the cases down for argument together during the week of April 21. The Government also submits that the petitions for certiorari in Nos. 611 and 612 should be granted.¹

The conflict between the decision of the Court of Appeals for the District of Columbia in the cases presently before the Court (Nos. 428 and 429) with the decision of the District Court, now affirmed by the Fourth Circuit, in Nos. 611 and 612, was emphasized by Penn Water (Pet., No. 428, pp. 1, 3, 4, 9, 14, 15, 17; see also Pet., No. 429, pp. 29, 38) as a principal reason for granting certiorari in No. 428.² The Fourth Circuit's decision on affirmance was the first in the group of related cases which, by so stating explicitly, acknowledged that the two circuits were in disagreement. In addition, the issue upon which the two courts have disagreed is more likely to be reached in Nos. 611 and 612 than in Nos. 428 and 429. In

¹ The Federal Power Commission is, of course, a party in Nos. 428 and 429. It unsuccessfully sought to intervene in the Fourth Circuit in Nos. 611 and 612, but was allowed to file a brief and argue orally. It is appearing in this Court in the latter cases as *amicus curiae*.

² Penn Water's petition also relied of course, upon the conflict which the earlier decision of the Fourth Circuit in *Penn Water and Power Company v. Consolidated Gas, E. L. & P. Co.*, 184 F. 2d 552, certiorari denied, 340 U. S. 906, 186 F. 2d 934, which preceded the decision in the District of Columbia Court of Appeals.

the order reducing rates in Nos. 428 and 429, the Federal Power Commission prescribed certain rate schedules to supersede the previous rate and charges and ordered that all "other provisions of the * * * contracts in and of themselves la-
ful prescribing or defining the * * * services to be furnished * * * shall be observed and be in force" (No. 428, R. XVII 62, italics supplied), thereby excluding provisions which as private contracts might be authoritatively determined to be in violation of the antitrust law. The order involved in Nos. 611 and 612 (which has been upheld by the Third Circuit in *Safe Harbor W. P. Corp. v. Federal Power Commission*, 179 F. 2d 179, certiorari denied, 339 U. S. 957) contains no such qualification, and thus clearly requires compliance with the contract on file with the Federal Power Commission, ~~allegedly restrictive clauses~~ and all, unless and until the Commission modifies its own order. These factors make the controversy in Nos. 611 and 612 a more appropriate vehicle than Nos. 428 and 429 for determination of the important issue upon which the two circuits have disagreed, ~~i.e., whether the Federal Power Commission may order a power company to carry~~ out an arrangement which, as an agreement between the parties, would otherwise violate the Sherman Act. The denial of certiorari in the first ~~Penn. Water~~ case (346 U. S. 906)¹, in which the Federal Power Commission had only ordered compliance with arrangements "in and of themselves

lawful" and before the existence of the conflict with the District of Columbia Circuit would not, of course, justify a denial in Nos. 611 and 612 after the two Circuits had openly disagreed, and in a case in which the Commission had prescribed the arrangement found unlawful by the Fourth Circuit.

The desirability of hearing the cases together does not depend merely on the fact that they are in conflict. The companies and the State Commissions involved are the same. Penn Water and Consolidated each possess half of the voting rights in Safe Harbor, although Consolidated invested two-thirds of the capital and is entitled to two-thirds of the power. The contracts have been found by the Fourth Circuit to be indistinguishable both with respect to separability and anti-trust violation. And more importantly, Penn Water and the Pennsylvania Public Utility Commission, petitioners in Nos. 428 and 429, are insisting that the contracts are interdependent, that the Penn Water Contract "was linked to a companion contract (the Safe Harbor contract)." (Pet. No. 428, pp. 3, 14-15; Pet. No. 429, pp. 37-38). Both petitions urge that the Federal Power Commission "based the critical features of the orders * * * upon the assumed existence and continuance of the illegal Baltimore and *Safe Harbor* contracts." (Pet. No. 428, p. 3; Pet. No. 429, p. 37; italics supplied).³ The petitions also argue that the existence of the interstate power pool "depends upon the illegal contracts * * *

and upon the illegal revenue pooling provisions thereof" (Pet. No. 428, p. 14; Pet. No. 429, pp. 37-38). It is also contended (Pet. No. 428, p. 15) that the allocation of the reduction in rates as between the Baltimore company and the Pennsylvania utility customers of Penn Water rested on the basis of the alleged " 'entitlements' of Consolidated under the Baltimore and Safe Harbor contracts" and that "without the illegal contracts such 'entitlements' would be nonexistent." It is thus clearly petitioners' position in Nos. 428 and 429 that the decision of the Fourth Circuit in Nos. 611 and 612 as to the validity of the contracts supersedes the orders of the Federal Power Commission and destroys a portion of the premises upon which those orders rest.

The alleged interrelationship³ between the contracts and the Federal Power Commission orders with respect thereto makes it highly desirable that the cases be heard and decided together if this can be accomplished without undue delay. We are advised that counsel for Consolidated requested counsel for Penn Water to cooperate in Nos. 611 and 612 so as to enable all of the cases to be heard together this Term. This request, which seems

³ The Statements in both petitions repeatedly refer to the Safe Harbor contract as well as to the Penn Water contract (Pet. No. 428, pp. 3, 4, 6, 7, 9, 10; No. 429, pp. 12, 13).

⁴ The statement herein of the contentions of the petitioners in No. 428 and 429 and respondents in Nos. 611 and 612 is not to be taken as an admission of the validity of those contentions, but merely as showing the questions which will necessarily be argued in the cases.

to us to have been entirely reasonable, was refused on the ground that the cases were not sufficiently related, a position which hardly seems consistent with Penn Water's petition for certiorari in No. 428 and its emphasis on the conflict between them. By not consenting to certiorari in the case which establishes the conflict upon which it relied, Penn Water will prevent this Court from passing on the petition until March 31, which would normally be too late for the case to be heard this Term if certiorari is granted.

The circumstances set forth above, however, in our opinion, would justify the Court in granting certiorari in Nos. 611 and 612 and in setting them down for argument during the week of April 21. What we believe to be the critical issues involved will have been briefed in Nos. 428 and 429. As to the others, we are advised that if this motion to postpone the argument of the latter cases for three weeks is granted (thus indicating a possibility that the cases might be heard together), Consolidated and the Maryland Commission will immediately commence the preparation of their briefs in Nos. 611 and 612, and drafts will be served on respondents in these cases far enough in advance of argument to enable respondents to have the two weeks allowed by the Rules to reply thereto.

The Government does not wish to delay final decision in the already prolonged litigation involved in Nos. 428 and 429, but postponing the argument for three weeks would not unduly delay

the ultimate determination. And the advantages of hearing Nos. 611 and 612 at the same time and thus speedily disposing of all aspects of an inter-related controversy lead to the conclusion that both the public interest and the orderly management of this Court's business would be better served if the cases could be heard together this Term, notwithstanding the opposition of Penn Water to that procedure.

Accordingly, it is respectfully submitted that this Court should (1) postpone the argument in Nos. 428 and 429 until the week of April 21, (2) grant certiorari in Nos. 611 and 612, and (3) order the latter cases argued during the week of April 21, immediately following Nos. 428 and 429.

PHILIP B. PERLMAN,

Solicitor General.

~~BRADFORD ROSS,~~

General Counsel,

Federal Power Commission.

I join in this motion to postpone the argument in Nos. 428 and 429.

CHARLES D. HARRIS,

General Counsel,

Public Service Commission of Maryland.

MARCH, 1952.